79-395

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HAZEL MORRISON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-11a; App. C, *infra*, 14a-25a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 12a-13a) was entered on May 10, 1979, and

a petition for rehearing was denied on July 10, 1979 (App. C, *infra*, 14a). On July 30, 1979, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether dismissal of an indictment with prejudice is an appropriate sanction for law enforcement officers' misconduct that did not injure respondent in any way.

STATEMENT

In an indictment filed in June 1978 in the United States District Court for the Eastern District of Pennsylvania, respondent was charged with two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Under an agreement with the government, she pleaded guilty to one count but reserved the right to appeal the district court's denial of her motion to dismiss the indictment. She was sentenced to five years' imprisonment, to be followed by a three-year special parole term.

Before entering her plea, respondent moved to dismiss the indictment on the ground that agents of the Drug Enforcement Administration had improperly visited and interviewed her after her indictment in the absence of defense counsel. She alleged that this conduct violated her Sixth Amendment right to the effective assistance of counsel and a fair trial. Fol-

lowing an evidentiary hearing, the district court denied the motion.

1. The evidence presented at the hearing showed that on the afternoon of August 23, 1978, DEA agents Stephen Hopson and James Bradley visited respondent at her residence in an effort to obtain her cooperation in their investigation of a major heroin dealer. Before he and Agent Bradley went to see respondent, Agent Hopson discussed her case with Dennis Malloy, the DEA Agent primarily responsible for the investigation that led to respondent's arrest and indictment (App. A, *infra*, 3a).[1] Agent Malloy knew that Agent Hopson hoped to secure respondent's assistance, and he permitted Hopson to examine the file on her case (*ibid.*). Although Agents Hopson and Bradley knew of the criminal charges pending against respondent, they did not notify her attorney or the United States Attorney's office that they wished to interview her (*id.* at 3a-4a). Instead, they simply went to her house and questioned her about the source of her heroin during the period prior to her arrest. They told her that she faced a lengthy jail sentence and that, if she cooperated in their investigation, they would make a favorable sentencing recommendation to the United States Attor-

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[1] At the time he spoke with Agent Hopson, Agent Malloy knew that respondent was represented by retained defense counsel. As early as May 31, 1978, Agent Malloy and an Assistant United States Attorney had met with respondent's attorney for negotiations concerning the charges that would be filed against her (App. A, *infra*, 3a).

ney. They also told her about the government's protection plan for informants (*id.* at 4a).[2]

Agent Hopson asked respondent whether she was represented by private counsel or by an attorney from the public defender's office. When she identified her retained counsel, Agent Hopson inquired how much she had paid him. Respondent said that she had paid him $200. Agent Hopson replied that he had seen the attorney's work in connection with another case in the past, and he suggested that respondent think about the kind of legal representation she could expect for the amount of money she was paying.[3] Agent

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[2] Respondent testified that the agents warned her that the trial judge in her case was "the worst SOB in the federal courtroom" (App. A, *infra*, 4a n.3; Tr. 113). The agents testified that they did not recall the specifics of this conversation, and they were never directly asked whether they had referred to the trial judge in such derogatory terms (App. A, *infra*, 4a n.3; Tr. 8-30, 42-47, 93-104).

[3] Respondent testified (Tr. 112-113) that Agent Hopson told her that her lawyer could not do anything for her and that all he wanted was her money. According to respondent, the agent warned that "[i]f you decide to fight your case, your lawyer is going to make a[n] asshole out of hisself [*sic*] and you, too, in the courtroom." Respondent's son and sister also testified that Agent Hopson referred to respondent's attorney as an "asshole" (Tr. 152-156, 161). Agent Hopson's account of the conversation did not include any mention of such an epithet, and he was not asked directly whether he had used the term. On direct examination by the Assistant United States Attorney, Agent Hopson was asked, "Did you make any comments specifically concerning [respondent's attorney]?" He replied, "I don't recall. I said that I was a case agent against [him] in the past. I don't recall any further representation. I may have; I may not have" (Tr. 89-90).

Hopson also recommended that respondent seek the assistance of a public defender if she wished to cooperate with the DEA (App. A, *infra*, 4a; Tr. 89-90). Respondent did not give the DEA agents any information concerning her own case or the heroin dealer under investigation by Agents Hopson and Bradley. Agent Hopson left his telephone number with respondent, and the agents departed.

Respondent immediately called her attorney, and he went to her house. While he was there, respondent called Agent Hopson and arranged a meeting for the following day (App. A, *infra*, 4a). Agent Hopson did not appear at the appointed hour, but he did visit respondent's house several hours later. When he arrived, respondent told him that she had company and therefore could not talk (App. A, *infra*, 4a; Tr. 125, 155). Promising to call later in the evening, Agent Hopson left. That night, between 9 and 10 p.m., Agent Hopson called respondent to arrange an appointment for the next day, August 25 (Tr. 126, 142-144). Respondent testified that she told Agent Hopson that she wished to have her attorney present at such a meeting and that the morning hour proposed by the agent was inconvenient because she had a dental appointment (Tr. 44, 142-144).

The record does not show whether respondent and Agent Hopson agreed on a time for a meeting the next day, but, in any event, Agents Hopson and Bradley did visit respondent's house again on August 25, 1978. The conversation between them and respondent was similar to the one that had occurred

two days earlier (App. A, *infra*, 5a; Tr. 45). Respondent told the agents that she had nothing to say and would speak with them only in the presence of her attorney (Tr. 97, 126-127). The agents were annoyed, because they believed respondent's telephone call to Agent Hopson the previous afternoon meant that she was willing to cooperate with the DEA investigation. Agent Bradley testified (Tr. 102-103): "[B]oth of us actually were perturbed, not [to] the point of raising our voices, but we were disappointed and a little bit angered that we had to make a worthless trip out there." Agent Bradley told respondent that any further discussions would take place in the United States Attorney's office in the presence of her attorney (Tr. 97, 103). He then left the house, and Agent Hopson followed a few minutes later (Tr. 102, 129).[4]

2. Six days later, on August 31, 1978, respondent entered into a conditional plea agreement with the United States Attorney. She agreed to plead guilty to the first count of the indictment, and the government agreed to dismiss the second count. She agreed to withdraw her remaining pretrial motions in the event the district court denied her motion to dismiss on the basis of the DEA agents' misconduct, and the

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[4] Respondent testified (Tr. 129) that after Agent Bradley left the house, Agent Hopson stated that her "goddamn ass [would be] going to jail" and that the trial judge to whom her case was assigned "hate[s] black people." Agent Hopson recalled the August 25 conversation only in general terms, and he was not asked about the specific remarks attributed to him by respondent later in the hearing (Tr. 42-47).

government agreed that she could reserve her right to appeal such a denial, notwithstanding her guilty plea (Tr. 183-185, 196-197).

The district court denied respondent's motion to dismiss (Tr. 183), and respondent formally entered her plea of guilty. In the ensuing Rule 11 proceeding (Tr. 192-202), respondent admitted that on April 12, 1977, she sold 26.56 grams of heroin to a government informant for $1600. She also expressed agreement with the informant's statement that he had purchased heroin from her on numerous previous occasions and that, while her husband was in prison, she ran their heroin business from her home. Throughout the plea bargaining with the United States Attorney's office and the subsequent Rule 11 proceeding, respondent was represented by the same attorney who had represented her since the spring of 1978, before the indictment against her was returned by the grand jury.

3. The court of appeals reversed and directed the district court to dismiss both counts of the indictment with prejudice (App. A, *infra*, 1a-11a). The court acknowledged that the district court had not made any findings of fact in connection with respondent's motion to dismiss (*id.* at 2a n.2); it ruled, however, that dismissal of the indictment was justified solely on the basis of the undisputed facts and the testimony of the government's witnesses taken at face value (*ibid.*). The court did not disagree with the government's contention that respondent was not prejudiced by the DEA agents' misconduct in this case. Indeed, the court explicitly stated (*id.* at 11a) that "the im-

portuning of the government agents [was] unsuccessful" and did not result in respondent's abandoning her counsel or providing information useful to the prosecution. Nonetheless, the court held that the indictment should be dismissed because of the agents' "deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial" (*ibid.*). The court observed that violations of the Sixth Amendment frequently may be remedied by the suppression of evidence obtained as the result of the misconduct or by the ordering of a new trial where a conviction has been tainted in some way by government interference with the attorney-client relationship (*id.* at 8a). Here, however, the agents' error "is not amenable to remedy through suppression or reversal of conviction" (*id.* at 10a). For that reason, the court concluded, dismissal of the indictment is an appropriate sanction.

On the government's petition for rehearing, three judges of the court of appeals voted to grant rehearing en banc (App. C, *infra*, 15a-25a).

In a dissent joined by Judge Rosenn, Judge Garth stated that "the extreme sanction of dismissing the indictment" should not be imposed simply because "the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable, conduct of the government in this case" (*id.* at 18a). Stressing that respondent did not show or even claim that she was prejudiced by the government's misconduct (*id.* at 21a), Judge Garth warned that

"as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*id.* at 22a).

Judge Garth stated (App. C, *infra*, 22a-23a) that he agreed with the analysis of the Second Circuit in *United States* v. *Broward*, 594 F. 2d 345, cert. denied, No. 78-1535 (June 18, 1979). There, the court of appeals held that dismissal of an indictment is generally not an appropriate remedy when no prejudice is shown. The court said that in the absence of prejudice, dismissal should be considered, if at all, only in "the truly extreme cases," for example, a case in which such a drastic remedy is necessary "to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct" (*id.* at 351). Because there was no allegation or proof of "widespread, routine, constant or continuous" government misconduct in this case, Judge Garth concluded (App. C, *infra*, 24a) that the public should not be "punished for the misconduct of a government agent" when that misconduct did not harm respondent.

Judge Adams voted for rehearing en banc (App. C, *infra*, 24a-25a) because he viewed the question presented as "sufficiently important to warrant the attention of the full Court" and because the *Broward*

decision "was not brought to the attention of the panel before its opinion was filed."

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect and, if permitted to stand, will result in the release of an admittedly guilty defendant who was not prejudiced in any way by the government misconduct of which she complains. Moreover, the court of appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases, in which defendants will be encouraged to seek dismissals of their indictments on the basis of alleged constitutional violations that caused them no injury. The panel's decision finds no support in the rulings of this Court and directly conflicts with the approach adopted by every other federal circuit that has considered the question here presented. This Court should grant review to restore uniformity on this important point of criminal procedure and to establish that, except perhaps in extraordinary cases of flagrant and repeated government misconduct, an indictment should not be dismissed unless that is the only way to cure harm that a defendant has suffered as the result of an official infringement of his constitutional rights.[5]

1. In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court declined to find a violation of the

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[5] The filing of a petition for a writ of certiorari in this case is, of course, not intended to imply any approval or condoning of the DEA agents' conduct condemned by the court of appeals.

right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, even though an undercover state police agent was present at meetings between a criminal defendant and his attorney. The Court emphasized that the agent's intrusion did not produce any evidence used against the defendant at trial and did not result in the communication of defense strategy to the prosecution (*id.* at 558). Because the agent's attendance at the meetings did not have any effect on the defendant's trial and conviction, the Court held that the defendant had not suffered any deprivation of his constitutional rights. *Weatherford* thus indicates that some showing of prejudice is a prerequisite to a finding that alleged government misconduct violated the Sixth Amendment.

Respondent in the present case was not harmed in any way by the DEA agents' conversations with her outside the presence of counsel. As Judge Garth said in his dissent from the denial of rehearing en banc (App. C, *infra*, 21a; emphasis in original), "this case presents a situation where there has been *no showing* whatsoever that [respondent] has been prejudiced by the government's misconduct. There is no claim that confidential attorney-client communications were revealed to the government as a result of the conduct of the D.E.A. agents. Nor is there any claim that [respondent's] confidence in her attorney was undermined by governmental conduct, or that her guilty plea was induced by it." In the absence of some show-

ing of prejudice, *Weatherford* suggests that no constitutional violation occurred.

The court of appeals, however, emphasized (App. A, *infra*, 6a-8a) one aspect of the facts in *Weatherford* that is not present here. In the earlier case, the undercover officer's passive attendance at a meeting between the defendant and his attorney was motivated by a desire to maintain the agent's secret identity and thus to preserve his effectiveness as an undercover investigator. The Court recognized "the unfortunate necessity of undercover work" (429 U.S. at 557) and observed that the officer attended the meeting only in order to avoid raising suspicion and only at the invitation of the defendant and his lawyer. The Court concluded that there had been no "purposeful intrusion" (*id.* at 558) into the attorney-client relationship. Here, by contrast, the DEA agents deliberately visited respondent, apparently made disparaging remarks about her attorney, and suggested she obtain new counsel if she wished to cooperate with the government's investigation. The court of appeals ruled (App. A, *infra*, 6a-7a; emphasis in original) that

> *Weatherford* applies * * * when there is *both* no prejudice to defendant's case *and* no wrongly motivated intrusion into the attorney-client relationship. * * * In the case of a deliberate attempt actually to sever or otherwise to interfere with the attorney-client relationship, a much more explicitly intrusive offense, the analysis must proceed differently.

The court held that because the agents intended to affect respondent's relationship with her attorney, their conduct did infringe the constitutional right to counsel (*id.* at 7a).

But, as the court of appeals itself acknowledged (App. A, *infra*, 10a), this is not the end of the case. Even if the panel is correct that *Weatherford*, properly read, permits the finding of a Sixth Amendment violation whenever a wrongly motivated government agent seeks to intrude on the attorney-client relationship, the question of remedy remains. And this is where the court of appeals' error is most serious.

Courts ordinarily tailor the relief awarded in particular situations to fit the harm incurred. For example, when incriminating evidence is obtained as a result of improper police questioning of a defendant in the absence of counsel, the evidence is suppressed. See, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964). Likewise, when government agents improperly overhear pretrial conversations between a defendant and his lawyer, and the defendant is subsequently convicted, a new trial may be ordered to ensure that the conviction is not based on wrongfully obtained information. *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Alternatively, the district court may be required to conduct a hearing on the effect of the intrusion on the fairness of the defendant's trial and to order a new trial if it determines that the conviction is tainted by the interference with the attorney-client relation-

ship. See *Black* v. *United States*, *supra*, 385 U.S. at 29-31 (Harlan, J., dissenting); *O'Brien* v. *United States*, *supra*, 386 U.S. at 345-347 (Harlan, J., dissenting).[6] Similarly, when a criminal defendant alleges that he has received ineffective assistance of counsel, the reviewing court will examine the record and grant a new trial if it appears that the defendant was prejudiced by counsel's acts or omissions or if the record does not permit an accurate evaluation of the consequences of the conduct of which the defendant complains. *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1332 (9th Cir. 1978) (en banc), cert. denied, No. 78-6157 (Mar. 26, 1979).[7]

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[6] In an extreme case, where the taint cannot be purged by a new trial (*e.g.*, where the government has learned of confidential defense strategy and the court has no way to ensure that the government will not use this information in preparing for a second trial), a court may order dismissal of the indictment to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978).

[7] For example, when no counsel is provided or when counsel is prevented from discharging his normal functions, a reviewing court may be unable to assess the extent of the injury suffered. In such instances, a new trial may be ordered even without a showing of specific harm. See, *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (defense counsel prevented from consulting with his client during an overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (counsel denied the opportunity to make a summation of evidence before the rendition of judgment); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (indigent defendant denied the assistance of counsel in felony trial); *Glasser* v. *United States*, 315 U.S. 60 (1942) (defendant's retained counsel appointed by the court to represent a co-defendant as well).

A comparable remedial pattern has emerged in cases involving alleged violations of constitutional rights other than the right to counsel guaranteed by the Sixth Amendment. The suppression of evidence discovered or seized in violation of the Fourth Amendment or obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination is a familiar feature of modern criminal trials. And, of course, if such evidence is mistakenly admitted at trial and contributes significantly to the defendant's conviction, he will be granted a new trial at which the tainted evidence will be excluded.

This Court has never suggested, however, that a defendant who has suffered no prejudice whatsoever is entitled to a dismissal of the indictment against him as a remedy for a constitutional violation, whether the government misconduct is intentional or inadvertent.[8] A party who has not been injured is

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[8] Indeed, in the Fifth Amendment context, the Court stated in *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (footnote omitted):

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

not ordinarily entitled to any remedy at all.[9] Whatever remedies respondent may have against the DEA agents who criticized her attorney or against the government as the agents' employer,[10] there is no

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[9] This is the general principle underlying the Court's ruling in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), that even errors of constitutional proportion may be harmless. See *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (remanding for harmless error determination concerning the introduction at trial of evidence derived from a pretrial corporeal identification at which defendant was improperly denied the assistance of counsel); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (in light of other evidence of guilt, admission of pretrial confession allegedly obtained in violation of constitutional right to counsel was harmless error); *United States* v. *Wade*, 388 U.S. 218, 242 (1967) (use of in-court identifications at trial may be harmless error even if tainted by pretrial lineup improperly conducted without notice to and outside the presence of defense counsel).

[10] Relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent may be able to state a cause of action for damages against the DEA agents on the basis of their alleged Sixth Amendment violations. App. C, *infra*, 19a n.2, 22a n.4; *Davis* v. *Passman*, No. 78-5072 (June 5, 1979). *Weatherford* itself was a damage suit, brought under 42 U.S.C. 1983, against the state undercover officer and another state official who was allegedly responsible for the intrusion of a police agent into the meeting between a criminal defendant and his attorney. See also *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). On August 22, 1979, respondent filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking $10,000 compensatory damages and $100,000 punitive damages against the DEA and Agents Hopson, Bradley, and Malloy for their roles in the incidents now under consideration. The suit potentially presents several difficult factual and legal questions, *e.g.*, whether respondent will be able to prove actual damages even though she suffered no prejudice in her criminal case; whether punitive damages

reason why she should be awarded relief in the pending criminal proceeding against her, a proceeding that was not affected in any way by the agents' behavior. There is certainly no reason why she should

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should be available in the absence of substantial actual damages; whether punitive damages are ever available in a *Bivens* action; whether federal law (the law that presumably governs *Bivens* actions) should adopt a punitive damages standard derived from state law or should develop its own common law standard. But however these questions may be resolved, the propriety of the court of appeals' dismissal of respondent's indictment will not be affected. That remedy remains inappropriate, regardless of whether other relief is available.

We note for the Court's information that the 95th Congress considered proposed legislation that would make a claim against the United States the exclusive civil remedy for many kind of wrongful acts that may be performed by federal employees acting within the scope of their employment. See H.R. 9219, S. 2117, 95th Cong., 1st Sess. (1977). The bills provided that, with respect to constitutional tort claims, the United States would be liable for liquidated damages of $1,000, in the absence of proof of actual damages in a greater amount. See *Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 2 (1978). Similar legislation has recently been introduced in the 96th Congress (H.R. 2659), and the House Judiciary Committee held hearings on the bill on June 20, 1979.

In addition, of course, although respondent will not benefit directly from such action, the DEA agents involved in this case are subject to possible imposition of departmental disciplinary measures. App. C, *infra,* 22a n.4. DEA officials have informed us that sanctions directed against Agent Hopson, including possible temporary suspension, are now under consideration, and a final departmental decision is expected within 30 days.

be entitled to the drastic remedy of dismissal of the indictment with prejudice. The DEA agents' improper visits and conversations with respondent in August 1978 were not part of the criminal acts she performed in April and May 1977 [11] and did not contribute to the government's ability to prosecute her for those offenses. Accordingly, if respondent can successfully claim any relief, she must do so in some proceeding separate from her criminal prosecution.

In his dissent from the court of appeals' denial of rehearing en banc, Judge Garth cogently exposed the logical flaws in the panel's reasoning. He explained that the court's finding of a constitutional violation does not lead inevitably to the conclusion that the indictment should be dismissed. On the contrary, "dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means" (App. C, *infra*, 21a; see note 6, *supra*). The court's decision, in Judge Garth's words, "turns [this rule] on its head" (App. C, *infra*, 21a). The indictment is dismissed, not because the court cannot conceive of any other way to remedy the in-

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[11] Cf. *Hampton* v. *United States*, 425 U.S. 484 (1976), in which petitioner contended that the Due Process Clause of the Fifth Amendment barred his conviction because law enforcement officers were excessively involved in the criminal enterprise. The plurality opinion stated (425 U.S. at 490): "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

jury suffered by respondent, but because respondent was not injured and the court therefore cannot imagine any other remedy that is available. The consequences, as Judge Garth observed (*id.* at 22a), are little short of absurd. Not only is a criminal defendant immunized although government misconduct has caused her no harm, but further defendants are taught they "may be better off by alleging no prejudice" than by complaining of the injury suffered as the result of a constitutional violation (*ibid.*). In the latter event, the most likely remedies are the suppression of evidence, a new trial order, or an order vacating a tainted guilty plea. But, if a defendant "succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*ibid.*).

2. The decision of the court of appeals authorizes the dismissal of an indictment in circumstances that would not justify such a remedy under the standards established by several other circuits. Because allegations of government misconduct usually arise in distinctive factual situations, it is not certain that the court of appeals' approach in this case would lead to different results in cases that have already been decided elsewhere. But it is clear on the basis of the published opinions that every other court of appeals that has considered the matter would not order dismissal of an indictment on the facts of the present case.

The Second Circuit has recently held that dismissal of an indictment is an appropriate sanction only in

truly extreme cases where there is "a need either to eliminate prejudice to a defendant in a criminal prosecution, where it [is] impossible to do so by imposition of lesser sanctions, or to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct." *United States* v. *Broward*, 594 F.2d 345, 351, cert. denied, No. 78-1535 (June 18, 1979). See also *United States* v. *Fields*, 592 F.2d 638, 648 (2d Cir. 1978), cert. denied, Nos. 78-1474, 78-1480, and 78-1483 (June 4, 1979); *United States* v. *Brown*, No. 79-1011 (2d Cir. July 13, 1979), petition for cert. pending, No. 79-5236.[12]

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[12] The government's briefs in opposition in *Broward* and *Fields* were filed within three weeks of the court of appeals' decision in the present case and did not mention the ruling now under discussion. The Second Circuit cases did not involve alleged interferences with the attorney-client relationship. Petitioner in *Broward* argued that his indictment should have been dismissed because of misstatements in the affidavit supporting the warrant for his arrest and alleged perjury by government agents at a pretrial suppression hearing. Petitioners in *Fields* contended that their indictment should have been dismissed because attorneys at the Securities and Exchange Commission concluded a settlement with petitioners in a civil injunctive proceeding without disclosing that they had urged the United States Attorney to conduct a criminal investigation of the same transactions. While the court of appeals in the present case has dismissed an indictment in circumstances that would lead other circuits to find that remedy inappropriate, the court has not held that every instance of deliberate government misconduct in connection with a criminal defendant will call for dismissal. Accordingly, even though there is a conflict regarding the appropriate standard for evaluating requests for dismissal based on nonprejudicial government misconduct, it is by no means clear that the Third Circuit would have reached a different result

Similarly, the Seventh Circuit has ruled that an indictment should not be dismissed when the defendants "have shown no prejudice, and no continuing abuse of the criminal processes." *United States* v. *Stanford*, 589 F.2d 285, 299-300 (7th Cir. 1978), cert. denied, No. 78-6041 (Apr. 2, 1979). The Fifth, Eighth, and Ninth Circuits also have agreed that a showing of prejudice is critical either to establish a Sixth Amendment violation or to justify a dismissal of an indictment. See *United States* v. *Acosta*, 526 F.2d 670, 674 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196-1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Glover*, 596 F.2d 857, 861-864 (9th Cir. 1979), petition for cert. pending, No. 78-6865; *United States* v. *Owen*, 580 F.2d 365, 367-368 (9th Cir. 1978). See also *United States* v. *Franklin*, 598 F.2d 954, 957 (5th Cir. 1979), petition for cert. pending, No. 79-250; *United States* v. *Jernigan*, 582 F.2d 1211, 1213-1214 (9th Cir.), cert. denied, No. 78-5627 (Nov. 27, 1978). But cf. *United States* v. *McCord*, 509 F.2d 334, 348-351 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) ("serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indict-

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in *Broward* or *Fields*, where the alleged misconduct was arguably less egregious and did not infringe the Sixth Amendment right to the effective assistance of counsel. For this reason, we believe that, even if the Court were to undertake review here, there is no need to hold *Broward* and *Fields*, both of which are now at an interlocutory stage, for the disposition of this case.

ment or a new trial, without regard to prejudice to the accused," but "prejudice, actual or potential, is relevant" (509 F.2d at 349, 350) to the determination).

3. Finally, review should be granted in this case because, if left undisturbed, the opinion of the court of appeals may perceptibly increase the already heavy burdens on the federal criminal justice process by giving rise to a large number of motions alleging no prejudice but seeking dismissal of an indictment on the ground that government officials allegedly engaged in misconduct, either after the indictment as here, or during the investigation that preceded the indictment. The factual hearings on such motions will delay the speedy disposition of criminal cases, even if the district courts seldom find the remedy of dismissal to be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

SIDNEY M. GLAZER
Attorney

SEPTEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2258

UNITED STATES OF AMERICA, APPELLEE

v.

MORRISON, HAZEL, APPELLANT

Appeal From the United States District Court
for the District of Eastern Pennsylvania
D.C. Crim. No. 78-00193

Argued February 22, 1979

Before HUNTER, WEIS, *Circuit Judges*, and
MARKEY, *Chief Judge*, of the Court of Customs
and Patent Appeals *

Opinion Filed May 10, 1979

Salvatore J. Cucinotta (Argued)
Attorney for Appellant
William E. Ball (Argued)
Peter F. Vaira
Walter S. Batty, Jr.
Bonnie Brigance Leadbetter
Attorneys for Appellee

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On June 28, 1978, the Appellant, Hazel Morrison, was indicted on two counts of illegally distributing heroin in violation of 21 U.S.C. § 841(a)(1) (1976). Prior to trial, she filed a Motion to Dismiss the Indictment with Prejudice, alleging denial of her sixth and fourteenth amendment right to effective assistance of counsel and her fourteenth amendment right to a fair trial. The motion to dismiss was heard in the United States District Court for the Eastern District of Pennsylvania and was denied without opinion. Immediately after the announcement of the district court's decision denying the motion, Morrison entered an opinion conditional plea of guilty to one count of distribution.[1] She was subsequently sentenced to five years imprisonment, with a special parole term of three years to follow.

2. The record in this case shows that agents of the Drug Enforcement Agency effected a willful and unjustified interference with Mrs. Morrison's sixth amendment right to counsel.[2] We conclude that both

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[1] The guilty plea was contingent upon appeal of the district court's ruling to this Court. We approved the use of the conditional guilty plea in *United States* v. *Zudick*, 523 F.2d 848 (3d Cir. 1975), and *United States* v. *Moskow*, 588 F.2d 882 (3d Cir. 1978), and find the appeal to be properly before us now.

[2] The district court did not make any findings of fact or draw any conclusions of law when it denied Morrison's motion to dismiss the indictment. On appeal, we are not free to canvass the record and make our own findings of

counts of the indictment against Morrison should be dismissed with prejudice.

I.

3. On May 31, 1978, Salvatore Cucinotta, Morrison's lawyer, met with Assistant U.S. Attorney Jack Riley and D.E.A. agent Dennis Malloy for the purpose of engaging in pre-trial negotiations. At least from that date, the government knew that Mrs. Morrison was represented by counsel. Subsequently, agent Malloy was contacted by another D.E.A. agent, Stephen Hopson. Hopson was engaged in the investigation of a heroin dealer, and wished to gain Mrs. Morrison's cooperation in that investigation. Malloy was aware that Hopson wanted to negotiate with Mrs. Morrison, and knew that Hopson wished to "solicit her cooperation." Malloy discussed the case against Morrison "generally" with Hopson, and Hopson was allowed to examine the file on defendant's pending trial. Hopson also had "two or three" conversations with Assistant U.S. Attorney Riley in which Morrison's "name came up".

4. On August 23, 1978, D.E.A. agents Hopson and James Bradley visited defendant's home with neither

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fact. However, accepting all factual statements over which there is no dispute, adopting the pleadings submitted by the government, and taking at face value the testimony of the agents who were the government's witnesses, we still find that a pattern of impermissible conduct emerges. In any event it should be borne in mind that the dispute on appeal does not turn so much on how we characterize the conduct, as on whether we are justified in ordering the relief requested by the defendant.

the knowledge nor the permission of her counsel. At that time Hopson questioned Mrs. Morrison about the source of her heroin during the period prior to her arrest; suggested that she was facing a stiff jail term;[3] observed that he could make recommendations to the U.S. Attorney as to whether she should receive a lenient or heavy sentence; and told her about the government's protection plan for informers. Hopson also questioned Mrs. Morrison about how much money she was to pay Mr. Cucinotta. He then stated that he had seen her counsel's work, and suggested to Mrs. Morrison that she retain a public defender instead. He also urged her to obtain the services of a public defender if she wished to cooperate with the D.E.A. Finally, he suggested that she should think about the quality of the representation that she would receive for the amount of money ($200) that she was paying attorney Cucinotta. Upon departing, he gave defendant his telephone number.

5. Mrs. Morrison immediately called attorney Cucinotta, who went to her home. While he was there, Morrison called the number she had been given and made plans to meet agent Hopson between noon and 1:00 p.m. of the next day. However, that next day Hopson did not arrive as scheduled, but appeared without warning at about 6:00 p.m. The defendant told him that she had company and couldn't speak,

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[3] Mrs. Morrison testified that the agents warned her that the trial judge in her case was the "worst SOB in the federal courts", that he "hates black people", and that her "goddamn ass [was] going to jail". The agents testified that they did not recall the specifics of this conversation.

and that in any event she wanted her lawyer present. Hopson departed. One day lated Mrs. Morrison received yet another surprise visit from agent Hopson. According to Hopson's testimony he repeated the statements he had made during his first visit.

6. The government "readily concedes that the agents erred in attempting to elicit the cooperation of Morrison without working through her attorney." On these facts, we are confronted with neither the proverbial constable's blunder, nor overzealousness in the pursuit of otherwise legitimate law enforcement ends. Rather, we have a pattern of conduct calculated to intrude upon and destroy the attorney-client relationship.

II.

7. The government presents us with two threshold questions which must be answered before we may consider the advisability of granting such extraordinary relief as dismissal of the indictment. First, it contends that we are precluded by *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), from granting any relief at all. Second, it claims that, even if there has been a sixth amendment violation, dismissal of the indictment is not a permissible remedy.

8. The government reads *Weatherford* as holding that, in the absence of demonstrable prejudice, no sixth amendment violation occurs. We disagree. In *Weatherford*, the Supreme Court was asked to determine whether the presence of an undercover police officer at a strategy meeting between a defendant and his counsel amounted to a constitutional viola-

tion. The police officer, when in fact invited by the defendant, attended exclusively for the purpose of preserving his undercover identity and did not relate anything that he had heard during the course of the meeting. The Court of Appeals for the Fourth Circuit concluded that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Bursey* v. *Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975). The Supreme Court reversed, reasoning that not every intrusion into the attorney-client relationship is a violation of the sixth amendment right to counsel, and rejected the Fourth Circuit's *per se* test. The Court's decision was a narrow one. The Court held only that "there being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the sixth amendment." 429 U.S. at 599. This holding is not broad enough to support the interpretation that the government urges upon us, namely that mere failure to gain evidence or tactical advantage from an intrusion bars any finding of a sixth amendment violation.

9. *Weatherford* applies, in the eavesdropping context, when there is *both* no prejudice to defendant's case *and* no wrongly motivated intrusion into the attorney-client relationship. This leaves untouched a vast range of conduct which does constitute a recognizable violation of the right to effective assistance

of counsel.[4] In the case of a deliberate attempt actually to sever or otherwise to interfere with the attorney-client relationship, a much more explicitly instrusive offense, the analysis must proceed differently. Here, it is appropriate to consider the purpose and propriety of the agent's conduct and its effect on the defendant's rights and the attorney-client relationship.[5] We had cause to consider this issue in *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). There, prison officials were accused of wrongfully preventing an attorney from contacting his prisoner-client during the period immediately before trial. We advanced the test that, "if the interference was either wrongly motivated or without adequate justification, [it constitutes] an infringement of the constitutional right to counsel." *Id.* at 275.

10. This test for wrongfully motivated or inadequately justified interference is entirely consistent with the rationale of *Weatherford*, which itself identified purpose as a factor to be considered in the context of challenged eavesdropping. Indeed, since

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[4] Indeed, *Weatherford* is applied narrowly even in the eavesdropping context. In United States v. Levy, 577 F.2d 200 (3d Cir. 1978), we found that mere disclosure of attorney-client confidences constituted prejudice under the *Weatherford* test, without regard to whether there was any prejudicial effect on the outcome of the trial.

[5] This is exactly what was done in Gallarelli v. United States, 441 F.2d 1402, 1405 (3d Cir. 1971). There, we reversed a conviction based on a guilty plea negotiated in the absence of counsel. We held that "a plea entered without such guidance must be set aside without inquiry whether demonstrable harm resulted in the case in question."

in *Weatherford* the police officer intruded only to the extent that it was necessary to be physically present at defense meetings to preserve his cover, the intrusion was neither wrongly motivated nor without adequate justification, and would have been upheld under the *Via* test.[6] Accordingly, we conclude that *Weatherford* does not bar us from finding a violation on the facts before us.

11. The government next advances the contention that even if we find a sixth amendment violation, we are limited to ordering either suppression of evidence or a new trial. The government argues that since neither of these orders would be appropriate in this case, we are precluded from granting any relief at all. We readily agree that suppression or new trial are frequently appropriate forms of relief for sixth amendment violations. The government has cited a number of our previous decisions wherein such relief was ordered. However, none of those cases even suggests the novel rule that these two forms of relief are exclusive.[7] There is no principle advanced by the government which would limit our power to dismiss

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[6] As the Supreme Court noted in reference to the police officer's justification, "Our cases, however, have recognized the unfortunate necessity of undercover work." 429 U.S. at 557.

[7] Two examples demonstrate the inaptness of the government's authority to the proposition for which it has been cited.

In United States v. Cobbs, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973), we held that custodial interrogation in the absence of counsel was permissible if the defendant had freely and intelligently waived his right to have counsel present. Defendant had requested that the evidence gathered

the indictment should such a deterrent appear warranted.

12. In *Via* v. *Cliff*, we found that purposeful interference with the attorney-client relationship made out a colorable claim to relief under § 1983. There was no request for relief in the nature of dismissal of an indictment in that case. In *Gallarelli* v. *United States*, 441 F.2d 1402 (3d Cir. 1971), we found that the guidance of counsel during plea bargaining was so critical that a counsel-less bargain (i.e. one negotiated during a brief period when defendant was "between" attorneys) could not be accepted. There, we vacated the conviction that was based on the guilty plea. The question of whether dismissal was an appropriate remedy never arose. However, in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), we found it necessary to dismiss an indictment as the remedy for a sixth amendment violation. In that case a D.E.A. informer sat in on meetings between defendant and his counsel and disclosed the defense strategy to prosecution officers. Because an attempt

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from the interrogation be held inadmissible, but we had no need to reach that issue.

In United States v. Crook, 502 F.2d 1378 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975), we were confronted with a lower court's suppression of a confession made after a knowing waiver of defendant's *Miranda* rights, where the court found that the police officers knew that defendant was represented by counsel in an unrelated case. Our narrow holding was that the court could not suppress a confession made in full compliance with *Miranda*, because of what it found to be "unethical" police conduct. In the case before us today, we find an actual constitutional violation, and are free to provide an appropriate remedy. *Crook* is silent as to what the contours of that remedy should be.

to assess the prejudice to the defendant would have been speculative at best, we held that the intrusion and mere disclosure, without more, was sufficient to make out a sixth amendment violation. In light of the fact that no other relief would remedy the violation, and considering the extent and seriousness of the improper conduct of the government, we found the only appropriate relief for the violation to be dismissal of the indictment.

III.

13. The case before us fits this pattern. Under the test in *Via* and *Gallarelli*, the challenged conduct represents not only an "inadequately justified" but a thoroughly unjustified and wrongly motivated interference with the attorney-client relationship, and constitutes a violation of the defendant's sixth amendment right to effective assistance of counsel. As in *Levy* the conduct is not amenable to remedy through suppression or reversal of conviction.

14. What remains for decision is whether dismissal of the indictment is appropriate in the circumstances of this case. The government has conceded that the agents' actions were error, but urges that the admitted error was essentially harmless. The government apparently fails to appreciate the sixth amendment. As the Supreme Court has said, "Right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of damage arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). In this case, the actual conduct, its motivation, its intended effect, and its pointed intrusive-

ness are readily apparent. Alone with the defendant, but with the knowledge that she was represented by counsel, the D.E.A. agents attacked the dedication and competence of her lawyer and attempted to raise doubts in her mind about his effectiveness. They represented themselves as having influence with the prosecution as a means of coercing defendant into abandoning her counsel and her defense.

15. The deliberate undermining of constitutional rights must not be countenanced. This is particularly so when, as here, the matter will come to the attention of the courts only when the importuning of the government agents is unsuccessful. There is, therefore, real danger that the courts themselves may become the unwitting instrumentality through which government agents may interfere with basic constitutional rights.

16. We have found a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial. Accordingly, the judgment will be reversed, the sentence will be set aside, and the case will be remanded to the district court for the entry of an order dismissing both counts of the indictment with prejudice.

TO THE CLERK:

Please file the foregoing opinion.

JAMES HUNTER, III
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2258

UNITED STATES OF AMERICA

vs.

MORRISON, HAZEL, APPELLANT

(D. C. Criminal No. 78-00193)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER and WEIS, *Circuit Judges* and MARKEY, *Chief Judge* of the Court of Customs and Patent Appeals *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennnsylvania and was argued by counsel on February 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

said District Court, filed October 11, 1978, be, and the same is hereby reversed, the sentence set aside and the cause remanded to the said District Court for entry of an order dismissing both counts of the indictment with prejudice, in accordance with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

May 10, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2258

UNITED STATES OF AMERICA, APPELLEE

v.

MORRISON, HAZEL, APPELLANT

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. A separate opinion Sur Denial of Petition for Rehearing is being filed by Judge Garth, joined in by Judge Adams and Judge Rosenn.

BY THE COURT,

JAMES HUNTER, III
Circuit Judge

Dated: July 10, 1979

GARTH, *Circuit Judge*, dissenting from Order denying Petition for Rehearing:

I vote to grant the government's petition for rehearing *in banc*. In my view, the panel opinion, which will now become the law of this circuit, has reached an illogical result—a result which bears no relationship to the evil which the panel has properly condemned. In this case government agents sought to interfere with the relationship between a criminal defendant and her counsel. However, despite an acknowledged absence of prejudice to the defendant, the panel in finding a sixth amendment violation has ordered that the defendant's indictment be dismissed —a sanction without precedent in this or other circuits.

Inasmuch as under this circuit's operating procedures, only a court in banc may override a panel's published opinion (Internal Operating Procedures p. 25), I have voted for the court in banc to reconsider the panel's decision in this case—a decision which I believe to be seriously flawed, in both analysis and result.

I

Hazel Morrison, the defendant-appellant, was indicted on June 28, 1978 on two counts of illegally distributing heroin in violation of 21 U.S.C. § 841 (a)(1). On May 31, 1978, Salvatore Cucinotta, Morrison's attorney, met with an Assistant United States Attorney and with Dennis Malloy, an agent of the Drug Enforcement Agency (D.E.A.), for purposes of engaging in pretrial negotiations. Therefore,

at least from May 31, 1978 on, the government knew that Morrison was represented by counsel. On August 23, 1978, D.E.A. agents Stephen Hopson and James Bradley visited Morrison's home without the knowledge or permission of her counsel.[1] According to the panel opinion, Slip Op. at 3,

> Hopson questioned Mrs. Morrison about the source of her heroin during the period prior to her arrest; suggested that she was facing a stiff jail term;[3] observed that he could make recommendations to the U.S. Attorney as to whether she should receive a lenient or heavy sentence; and told her about the government's protection plan for informers. Hopson also questioned Mrs. Morrison about how much money she was to pay Mr. Cucinotta. He then stated that he had seen her counsel's work, and suggested to Mrs. Morrison that she retain a public defender instead. He also urged her to obtain the services of a public defender if she wished to cooperate with the D.E.A. Finally, he suggested that she should think about the quality of the representation that she would receive for the amount of money ($200) that she was paying attorney Cucinotta. Upon departing, he gave defendant his telephone number.

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[3] Mrs. Morrison testified that the agents warned her that the trial judge in her case was the "worst SOB in the federal courts", that he "hates black people", and that her "goddamn ass [was] going to jail". The agents testified that they did not recall the specifics of this conversation.

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[1] Prior to this visit, Hopson had spoken with Malloy concerning Morrison. Hopson was investigating a heroin dealer, and wished to gain Morrison's coperation in that investiga-

Undaunted by this encounter, Morrison immediately called her attorney, who came to her home. In Cucinotta's presence, Morrison called the telephone number given her by Hopson. Apparently in an attempt to verify the misconduct of the D.E.A. agents, she made plans to meet Hopson between noon and 1:00 p.m. of the next day. Hopson did not arrive at the scheduled time, however, but came instead at 6:00 p.m. He departed upon being informed by Morrison that she had company and could not speak, and that in any event she wanted her attorney present. The next day, August 25, 1978, Morrison received another visit from Hopson. According to Hopson's testimony he repeated the statements he had made during his first visit.

Prior to trial, Morrison filed a Motion to Dismiss the Indictment with Prejudice, alleging denial of her sixth and fourteenth amendment right to effective assistance of counsel and her fourteenth amendment right to a fair trial. This motion was denied without opinion by the district court. Immediately thereafter, appearing with her same attorney Salvatore Cucinotta, Morrison entered a conditional plea of guilty to one count of distribution. She was sentenced to five years imprisonment, followed by a special parole term of three years. On appeal, a panel of this court reversed the judgment of sentence and remanded to the district court with an order to dismiss the indict-

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tion. Malloy discussed Morrison's case with Hopson, and Hopson had certain discussions with an Assistant United States Attorney in which Morrison's name was mentioned.

ment with prejudice because the government had interfered with Morrison's sixth amendment right to counsel!

II

There can be no excuse made for the improper conduct of the D.E.A. agents in this case. Nonetheless, I most strenuously disagree with the analysis and the result of the panel opinion. The logic of the panel opinion will simply not bear scrutiny. Apparently because the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable, conduct of the government in this case, it has decided to impose the extreme sanction of dismissing the indictment. The infirmity in the reasoning of the panel opinion is compounded by the result. Dismissal of the indictment despite the absence of any prejudice to the defendant from the misconduct of the government is completely unjustified.

A

The Supreme Court, in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), held that not all invasions of the attorney-client relationship by government agents would give rise to a sixth amendment violation. In that case, Bursey, the criminal defendant, sued Weatherford, a government informant, under 42 U.S.C. § 1983, alleging, *inter alia*, that Weatherford had violated Bursey's sixth amendment rights by attending two meetings with Bursey and his attorney. Rejecting the argument that such an intrusion was a per se violation of the sixth amendment, the

court reasoned that "[t]here being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment . . . ." 429 U.S. at 558.[2]

The test formulated in *Weatherford* v. *Bursey*, *supra*, was applied by this court in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1977). *Levy* involved a direct appeal from a judgment of sentence in which the defendant, Levy, attacked his conviction on the ground that a government informant, posing as a co-defendant, had violated the privileged relationship between Levy and his attorney and had disclosed confidential defense strategy to government personnel.

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[2] In Via v. Cliff, 470 F.2d 271 (3d Cir. 1972), this court held that a prisoner could maintain an action *for damages* under § 1983 against prison officials for interference with the prisoner's right to counsel while he was confined in county prison awaiting trial. The court stated that if the prisoner "can prove that the interference was either wrongfully motivated or without adequate justification and involved the defendant(s), he will have established an infringement of his constitutional right to counsel by the defendant(s)." 470 F.2d at 275. Although the court stated that the prisoner "can maintain this cause of action without alleging or proving prejudice to his defense at trial by the alleged actual infringements," *id.*, it was apparent from the facts that the prison officials had engaged in the sort of purposeful conduct that the Supreme Court suggested in Weatherford v. Bursey, *supra*, would constitute a sixth amendment violation. The court in Via v. Cliff expressed no view as to the damages the prisoner might recover. *Id.* at 275 n.3. Thus, even if Morrison has established a sixth amendment violation within the standards set forth in Via v. Cliff, that opinion cannot be relied upon to support the dismissal of the indictment in this case.

As this court held, prejudice to the defendant would be presumed in such a case:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.
>
> . . .
>
> We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case.

577 F.2d at 208-09.

This holding is fully consistent with *Weatherford* v. *Bursey, supra,* which indicates that the sixth amendment will be violated whenever there is "communication of defense strategy to the prosecution . . . ." 429 U.S. at 558.

Concluding that a sixth amendment violation occurred, the *Levy* court determined that dismissal of the indictment was the only appropriate remedy because the information revealed by the government informant had become part of the public domain. 577 F.2d at 210. No contrived safeguards could assure that the information would not be made use of by the government if a new trial were ordered. *Id.*

Although it is a close question, I will assume that the conduct of the D.E.A. agents was sufficiently

"purposeful" in this case to give rise to a sixth amendment violation under the standards established in *Weatherford* v. *Bursey, supra.* But concluding that a constitutional violation occurred should in no way lead to the panel's holding that the indictment must be dismissed. As the *Levy* opinion indicates, dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means. This case, by contrast, does not present a situation where prejudice to the defendant cannot be remedied in alternate ways. Indeed, this case presents a situation where there has been *no showing* whatsoever that the defendant has been prejudiced by the government's misconduct. There is no claim that confidential attorney-client communications were revealed to the government as a result of the conduct of the D.E.A. agents. Nor is there any claim that Morrison's confidence in her attorney was undermined by governmental conduct, or that her guilty plea was induced by it.

Inexplicably, the panel opinion turns the rationale of *Levy* on its head; it reasons that because the defendant was not prejudiced, dismissal of the indictment is the only available remedy.[3] This analysis is fundamentally flawed. As the Government's Petition for Rehearing In Banc acutely points out, ". . . the panel's analysis reduces to the following *non*

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[3] The panel's reliance on Glasser v. United States, 315 U.S. 60 (1942), is misplaced. In *Glasser*, the court ordered a new trial because of a violation of the defendant's sixth amendment rights. The indictment was not dismissed.

sequitur: Since the [D.E.A.] agents' conduct was reprehensible, the defendant must be granted some relief; and since there was no disclosure to suppress or trial to re-try, dismissal is proper." In addition, the panel opinion works a significant harm to the public interest because it immunizes criminal defendants from prosecution even though government misconduct has caused them no harm.[4]

Indeed, as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed.

B

Even if the reasoning of the panel opinion were sound, which I do not believe it is, the result requiring dismissal of the indictment is utterly inappropriate in this case. I agree with the analysis of Judge

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[4] It is not necessarily the case that the government misconduct must go entirely unremedied in this case. The D.E.A. agents may be subject to departmental disciplinary measures. Moreover, they may be subject to suit in a civil action by Morrison under the rationale of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Of course, such a civil remedy would not preclude suppression in a criminal trial of any information gleaned by the government's violation of a defendant's sixth amendment rights. It is for these reasons as well that I disagree with the rationale of the panel opinion.

Feinberg in *United States* v. *Broward*, 594 F.2d 345 (2d Cir. 1979), *cert. denied*, 47 U.S.L.W. 3811 (U.S. June 19, 1979), as to when dismissal of an indictment is an appropriate remedy. In that case, the district court had determined that government officials inserted false materials into an arrest warrant and had lied in court. Consequently, the district court dismissed the indictment. The court of appeals reversed, ruling that "dismissal of the indictment was an inappropriate response." 594 F.2d at 351. Judge Feinberg reasoned as follows:

> In United States v. Fields, 592 F.2d 638 (2d Cir. 1978), [*cert. denied*, 47 U.S.L.W. 3786 (U.S. June 4, 1979),] Judge Timbers pointed out for this court that we have upheld the dismissal of an indictment only in very limited and extreme circumstances. In such cases, there was a need either to eliminate prejudice to a defendant in a criminal prosecution, where it was impossible to do so by imposition of lesser sanctions, or to deter a pattern of demonstrated and long-standing widespread or continuous official misconduct.
>
> . . .
>
> While these may not be the only conceivable circumstances in which we would uphold a dismissal, . . . we emphasize here, as was emphasized in Fields, that the sanction is so drastic that, especially where serious criminal conduct is involved, it must be reserved for the truly extreme cases.

594 F.2d at 351. *See United States* v. *Owens*, 580 F.2d 365 (9th Cir. 1978).

Under the standards set forth in *Broward*, dismissal of the indictment is an obviously improper remedy in this case. There has been no claim made, nor could there be, that Morrison was prejudiced by the government's misconduct, or that this type of misconduct is widespread, routine, constant or continuous. Neither remedial nor deterrence rationales support the extraordinary sanction imposed by the panel. As a consequence, the public is punished for the misconduct of a government agent even though that misconduct did no harm to the defendant.

III

This is a case in which, conceding the alleged misconduct of the government, the defendant did not sever her relationship with her attorney; the government learned nothing from its interview with her; and her attorney, whom she still retained, did no more than assist her in entering her plea of guilty. Thus, there exists simply no relationship between the sanction imposed and the injury which it redresses.

The government's petition for rehearing which followed the filing of the panel opinion reinforces my view that this case deserves in banc consideration. I therefore vote to grant the petition and I dissent from the court's order which denies it.

Judge Rosenn joins in this dissent.

Judge Adams also votes for rehearing *in banc*, because he believes that in view of the position of the

Second Circuit in *Broward* the issue in this case is sufficiently important to warrant the attention of the full Court. This would seem particularly so, he observes, since the *Broward* case was not brought to the attention of the panel before its opinion was filed.

Dated: July 10, 1979

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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